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# Affirmative Action in South Africa: Transformation or Tokenism?

*Penelope E Andrews\**

## Introduction

With the grand narrative of apartheid relegated to the status of an historical relic, the new South African narrative of non-racialism and nation-building is unfolding in remarkable ways. Since 1994, after the historic election, the South African government has found itself faced with enormous challenges. The first chapter of the unfolding narrative is the challenge of transformation: the movement from symbolism to substance, from individual aspiration to structural accommodation.

The new government found itself confronted with a host of contradictory political and economic forces. First, the reality of globalisation and the reification of markets substantially circumscribed the economic choices available to the government. This factor contradicted the political imperatives of redistribution in a society so plagued by economic inequality. In other words, even though the accepted political rhetoric had for decades been that the new South Africa would embrace socialist principles, the limitations posed by the new global economic order put paid to this idea.<sup>1</sup> Second, in the Western world, cultural clashes fuelled by 'identity politics' influenced some of the debates in South Africa concerning the substance of the new non-racial democracy (Meli, 1988: 67; Murray and Kaganis, 1994: 17). Part of the discourse related to indigenous minorities and how this new majoritarian democratic order would accommodate their interests (Andrews, 1998: 318).

The new South African government recognised that the euphoria of political transformation would be enormously deflated if the economic status quo were not modified. In brief, political rights had to lead to economic gains for a significant proportion of the population if the new democracy was to survive. Since post Cold War political realities put paid to any socialist aspirations, only certain limited options were

possible in the new political paradigm. One such option drawn from elsewhere was affirmative action.

Particularly since its entry upon the legal and policy stage in the United States just over 30 years ago, affirmative action<sup>2</sup> has generated the kind of passionate debate generally reserved for subjects touching on moral questions, like abortion or capital punishment. Whether affirmative action refers to the Malaysian experiment of unconditional set-asides for Malays, or India's modest attempts to incorporate Untouchables into the wider economic order through education and employment, or the United States' efforts at redressing the legacy of slavery, subordination and discrimination through various affirmative action programs, ideological polarisation ensures that reasoned debate on the subject is well nigh impossible. Both supporters and opponents of affirmative action are able to muster statistics to support their positions, and often a dose of anecdote makes the point even clearer.<sup>3</sup> In the swell of the debate, the historical context and the question of alternatives are rarely to be seen. For opponents the mantra of non-racialism, formal equal opportunity and the dogma of merit demonstrate the flaws of affirmative action. For proponents, the remnants of racism and the unquestioning logic of justice and equality provide ample justification for such programs and policies (Carter, 1991).

The genie had been out of the bottle for some time before South Africa had to face this issue squarely. As had been the case in the United States in the heady days of societal consensus around civil rights, in South Africa too there was general agreement at the constitutional negotiations that racism in all its manifestations needed to be eradicated. But the shape of such strategies would identify some significant differences amongst those committed to the eradication of apartheid.<sup>4</sup> One of the ironies surrounding the issue of affirmative action in South Africa is the easy way its purpose and subsequent acceptance have been transmogrified from that of a palliative mechanism to a transforming one. In the fairly recent past, introduction of the approach into South African political parlance was greeted with cynicism; a device for co-opting the black bourgeoisie. Such earlier observations by black political activists now provide fertile ground for certain opponents of affirmative action, particularly those who argue that nepotism and tokenism will inevitably underpin affirmative action programs (Kemp, 1992: 13).

In South Africa the realisation of affirmative action goals occurs in a context somewhat at odds with those societies where such experiments have taken place, for example, in Malaysia, India and the United States.<sup>5</sup> Within those contexts the ambition was largely to redress the structural impediments facing significant minorities burdened by racial, ethnic or caste disadvantage and discrimination. The paradigm of affirmative action is a limited one, incorporating the demands of discrete minorities who continue to make claims on the majority because of their outsider and minority status. Affirmative action is not seen as a transformational measure. But in South Africa the purposes of affirmative action involve an interplay with the overall goals of political and economic reconstruction of the society. Both in its constitutional directives and in the Reconstruction and Development Program (the RDP), affirmative action becomes part and parcel of the transformation project.<sup>6</sup> Affirmative action therefore incorporates not just policies and programs designed to provide individual access to employment, education and other resources, but also those aimed at 'uplifting' impoverished communities historically disadvantaged by apartheid laws and policies.<sup>7</sup> It has been observed that:

Affirmative action in South Africa has nothing to do with creating opportunities for a minority. Rather, it means transforming an economy that once barred 75 per cent of the population from any meaningful role (Menaker, 1994: 5A).

The Reconstruction and Development Program aims are to harness South Africa's human capital to transform the economy and the society. The RDP incorporates affirmative action not as a fleeting phenomenon, but as a process that is integrally tied to the business culture, academic endeavours and the public service.<sup>8</sup> The majority black population displays unequivocal support for affirmative action. However, they are prospectively the major beneficiaries of affirmative action and are dependent on the minority white population, particularly the corporate sector, to make such programs possible. In short, despite the widespread political support for affirmative action, such programs may run into problems because of white dominance of the economy.

This chapter addresses the issue of affirmative action in the newly democratic South Africa. It outlines the relatively easy adoption of affirmative action as principle and policy by the government, despite the likelihood that specific programs of affirmative action were likely to generate particular problems. The chapter locates affirmative action as

part of the overall agenda of transformation. It argues that, although racial identity was in the past utilised in the most opportunistic and pernicious ways by successive apartheid governments, the use of racial identity to further the aims of affirmative action will not contradict the present government's commitment to a non-racial democracy.

Section One deals with the legacy of apartheid. It argues that the rationale for affirmative action can be found in notions of compensatory and distributive justice, and diversity, and that the specific race conscious approach<sup>9</sup> will not detract from the ideal of non-racialism espoused by the majority party in government, the African Nationalist Congress. Section Two describes the first piece of affirmative action legislation and addresses some likely problems with the implementation of affirmative action programs, specifically in relation to their shape and the purported beneficiaries. Section Three focuses on the question of equality and the judiciary's approach to the issue. This section also discusses the first successful legal challenge to an affirmative action program of the Ministry of Justice. Section Four surveys the possibilities and limitations of affirmative action in South Africa, despite its popular support and *prima facie* constitutional protection. Implicit in the enquiry is the recognition that affirmative action remains one of a series of governmental assaults on poverty and economic inequality, and that affirmative action policies on their own cannot substitute for these governmental interventions.

## Section One: The Legacy of Apartheid

Affirmative action is the principled means of dealing, in as just and realistic a manner as possible, with the progressive eradication of the gulf created by past discrimination between black and white men and women. From the strategic point of view, it must be seen as an alternative both to waiting centuries for the market on its own to eliminate the massive inequalities left by apartheid, on the one hand, and to lawless confiscation and arbitrary sharing out on the other.<sup>10</sup>

This imprimatur from South Africa's most prominent citizen echoes popular sentiment in South Africa: that affirmative action programs are crucial to the eradication of the legacy of cemented racism and sexism, which typified the apartheid social, economic, political and legal edifice. Apartheid laws and policies left in their wake widespread racial disparities which will plague the society for many generations. These

disparities have been comprehensively documented and can be found across the societal spectrum (Sachs, 1993: 107). The apartheid state, for example, unabashedly spent four times more on education for a white child than it did on an African child; it granted preferential credit and grants to white farmers and not their black counterparts, and paid white pensioners more than blacks.<sup>11</sup>

The apartheid government's racial allocation of resources on education, health, welfare, housing and many other areas ensured that black people were locked into a spiral of dispossession, dislocation and poverty. These scant examples represent an ubiquitous system of discrimination and deprivation. Apartheid's particularly Kafkaesque system not only racialised the availability of resources through government spending, but a labyrinth of laws and policies ensured that black South Africans' access to resources through employment, access to property and other private economic activity were severely circumscribed. Laws and policies which regulated the movement of black labour and access to housing, with its deleterious impact on family life, cemented the economic inferiority of black South Africans (Budlender, 1985: 3).

This legacy rendered it essential that socio-economic rights could not be ignored in the new constitutional dispensation. The drafters of both the transitional and final Constitutions, and particularly representatives from the African National Congress, ensured the inclusion of socio-economic rights as fully justiciable in the Bill of Rights (Liebenberg, 1995: 375; Jeffrey, 1993: 8). It is within this context that affirmative action is located; as a meaningful mechanism to transform not only the political status quo, but the socio-economic edifice as well.

This unequivocal political support for affirmative action in South Africa contrasts with the complicated political arrangement in the United States, where the courts in particular are recoiling from past affirmative action mechanisms designed and implemented in more generous times.<sup>12</sup> This backdrop of hostile challenges in the courts signified to the South African constitutional framers the importance of constitutional protection for affirmative action policies and programs (Galanter, 1991: 18; Harris, 1993: 1709).

South African constitutional lawyers could draw on other models of affirmative action, most notably the Malaysian one, or the Indian model, and, of course, the ubiquitous American one.<sup>13</sup> The most uncontroversial

was to be found in the *Convention on the Elimination of Racial Discrimination* (the Racial Discrimination Convention)<sup>14</sup> and the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW).<sup>15</sup>

The Racial Discrimination Convention provides that:

States Parties shall, when the circumstances so warrant, take in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development or protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms ... (Art 2(2)).

Article 1(4) provides further that:

special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary . . . shall not be deemed racial discrimination.

Similarly, CEDAW (Article 4, Sections 1 and 2) provides as follows:

Adoption by States parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards. These measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

Adoption by States parties of special measures including those measures contained in the present convention, aimed at protecting maternity shall not be considered discriminatory.

The South African government has ratified both conventions.

#### *Policy justifications for affirmative action*

The rationale for affirmative action has been well canvassed in the literature<sup>16</sup> and is broadly categorised under three headings:

- (i) The notion of *compensatory justice*: implicit in this notion is the idea that the society has to compensate for the particular legacy of racial oppression and exclusion, the effects of which continue to burden the subordinated community. This notion has been articulated in the United States in several Supreme Court decisions, particularly in the early affirmative action cases.<sup>17</sup>

- (ii) The notion of *distributive justice*: this forms part of an idea that a fair and just society should afford opportunity to all its citizens; it is linked to universal notions of the civic duty. An American scholar has articulated this notion succinctly:

The personal sacrifice entailed by preferential policies is an obligation of citizenship just as taxes are: everyone has a role to play in reducing the debts that the society has undertaken, and the debts may be moral as well as financial (Carter, 1991: 256 n 5).

- (iii) The notion of *diversity*: proponents of affirmative action in both South Africa and the United States argue that the workforce should represent the racial and gender makeup of the society at large, and that there is both a moral and economic good in this approach; that diversity is not merely compatible with excellence, but actually promotes it (Sachs, 1993: 110; Kennedy, 1990: 705).

The purpose of affirmative action has been stated to redress systemic or structural discrimination; it differs from the traditional anti-discrimination model in that it does not arise from individual complaints. Underpinning affirmative action is the notion that stereotypes and prejudice exist at the subconscious as well as conscious level to thwart access and advancement for large numbers of disadvantaged groups. Equal treatment is seen as compounding the legacy of structural discrimination; the only equitable path is seen as some kind of preferential treatment.<sup>18</sup>

All three rationales will find justification in South Africa. The history of deprivation, discrimination and disadvantage has left unambiguous the need for redress and compensation. The commitment to distributive justice is found in the Reconstruction and Development Program, which outlines the goals of transformation. It has been recognised that the legacy of racial (and gender) exclusion in South Africa has stifled the accumulation of human capital, a precondition for successful economic development and growth (Ford, 1996: 31). The political platform of the African National Congress is strident about the party's commitment to the philosophy of non-racialism (Mandela, 1994; Frederickse, 1990). This version of non-racialism clearly reflects the ultimate goal of the society, while recognising the need to address the historical and contemporary encumbrances of racism (and sexism) wherever they are manifested. Although the principle of equality



underpins the text of the Bill of Rights (Albertyn, 1994), there is room for the policy of affirmative action. Section 9 states that:

Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons disadvantaged by unfair discrimination may be taken.

This constitutional recognition will go some way towards providing protection against constitutional challenges to programs and laws that establish affirmative action.

## Section Two: Problems of Implementation

Where affirmative action programs have been implemented, they have largely arisen as temporary measures in response to the apparent intransigence of racism and sexism, and they may not always have been very popularly received. In the United States, for example, it is arguable that there never has been widespread support for affirmative action and that the whole enterprise has consistently been subjected to scepticism and ambivalence (Brooks, 1990: 323). The Malaysian experiment appears to have enjoyed some success largely because of that government's commitment to transforming, or at least making the public sector represent, the dominant face of Malaysian society. But these measures, sometimes leading to nepotism or cronyism, have not been without their critics (Basham, 1983: 67). Affirmative action programs in India have also been subjected to considerable critique.<sup>19</sup>

It seems clear, therefore, that what affirmative action needs to address is the structural impediments to advancement created by racism and sexism. In South Africa, where the overwhelming number of poor people are black, removing racist and sexist barriers to advancement is in effect an attack on poverty. In addition and in combination with other governmental measures, thoughtfully designed affirmative action programs should therefore be able to attack the vast inequalities from which working people and poor people suffer.

This is the approach taken in South Africa. From its constitutional enshrinement to its inclusion in the Reconstruction and Development Program, affirmative action is seen as part and parcel of the overall transformation. As already noted, there is widespread political support for the policy in South Africa. From the beginnings of the constitutional

negotiations about the shape of the new society, affirmative action was quite easily accepted as both just and necessary for the newly enfranchised majority. However, in the years preceding the drafting of the Constitution and the first democratic elections, this clouded a thorough analysis of the problems associated with implementation of affirmative action programs and policies. Although fundamental jurisprudential questions about equality and affirmative action were well canvassed (Klug, 1991: 133), significant issues did not receive the same attention. These issues included the failure to articulate clearly who the proposed beneficiaries should be instead of the general assumption that 'non-whites' would be the major beneficiaries. Similarly, there was no clearly stated position regarding the use of goals, quotas, timetables, or the shape or character of the various programs. For example, would affirmative action in education be similar to such programs in employment? In other words, it appears that for a myriad of reasons the major political protagonists were lulled into a sense that the political commitment to affirmative action would adequately deal with the challenges it might face.

This is not to suggest that these specific details were not given some consideration. They were included in many of the discussions during the years leading to democratic elections. However, because a constitutional accord on the matter needed to be reached, the finer details were left for future consideration.

Affirmative action was made compulsory in the public service immediately following the elections in 1994, by amendment of the *Public Service Act* 1994 so as to allow for a candidate's race, gender or disability to be taken into account in considering the suitability of that candidate for appointment or promotion. The legislation left intact the traditional requirements of suitability for appointment or promotion: qualifications, training, education and other standard indicators of merit.<sup>20</sup>

The political realities of South Africa today suggest that, in the long term, affirmative action in the public sector will not continue to be a cause for concern. In other words, black South Africans will continue to be employed in significant numbers. First, the constitutional compromise to secure that jobs of white public servants for a stated period will fall away in 1999. In fact, many senior white public servants have already accepted early retirement packages, some remarkably generous. Second, the country is governed by blacks<sup>21</sup> and it is not too far fetched to

imagine that the public service will increasingly reflect that reality. The current Vice-President, who will presumably be the next President of South Africa, has already launched what is called the 'African Renaissance' and which will arguably have far reaching consequences for the public sector. However, the *Public Service Act* formed the basis for the first legal challenge to an affirmative action program (discussed in Section Three of this chapter), so even an optimistic prognosis of possibilities of affirmative action in the public sector cannot ignore the resistance which still dominates large sectors of the public service. However, for the reasons just stated, these are short-term problems that will not linger. Moreover, the government appears determined to overcome the opposition and a White Paper addressing affirmative action in the public service was launched in April 1998 by the Minister of Public Service and Administration (*This Week in South Africa* 28 April – 4 May 1998: 4).

It is in the private sector that affirmative action has been faced with the most difficult challenges. Up until 1998, the government had hoped that the private commercial sector would voluntarily introduce affirmative action programs, therefore countering the need for state regulation and intervention. However, the record thus far suggests that businesses in South Africa have been quite recalcitrant with respect to affirmative action (Montsi, 1993: 49). This recalcitrance is reflected, first, in the refusal of white businesses to consider the appointment of black candidates because they fear that in the process merit will be jettisoned or standards dropped; and, second, in their engagement in tokenism or window-dressing, that is, appointing black candidates to positions way beyond their skills or experience, and then using that appointment as a symbol of the company's commitment to affirmative action (Sachs, 1993: 120). This practice is particularly insidious because the candidate's inability to satisfactorily fulfill his or her task, or their never being treated in the way a white person similarly situated would, often reinforces the prejudice that black candidates are just not up to the job (Sparks, 1990: 214; Kelin, 1997: 55).

This state of affairs led to the passage of the first piece of affirmative action legislation in late 1998, the *Employment Equity Act*. The Act, introduced by the Minister of Labour, seeks to achieve equity in the workplace by:

- promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and
- implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workforce (Chapter 1, ss 2(a) and (b)).

The Act targets as 'designated groups' Black people (African people, people classified as 'Coloureds' and Indian South Africans), women and people with disabilities (Chapter 1 (i)). The Act's application is expansive. It applies to all employers who employ 50 or more employees, but excludes from its ambit local government, the National Defence Force, the National Intelligence Agency and the South African Secret Service. Significantly, it includes all organs of state as defined in the Constitution (Chapters 1(i) and 4).

The Act tabulates a series of steps which all 'designated employers' must take to satisfy its vision, and to reach the stated goal of employment equity. These steps include:

- preparing a profile of its employee population;
- analysing its employment practices and policies, and specifically identifying employment barriers which negatively affect members of disadvantaged groups;
- preparing and implementing an employment equity plan which sets out objectives, goals, timetables, procedures to implement and monitor the plan;
- assigning specific personnel to implement and monitor the plan;
- informing its workforce about the provisions of the Act and any other documents pertaining thereto, as well as making a copy of the employment equity plan available to employees;
- lodging a summary of the employment equity plan with the Department of Labour; and
- reporting annually to the Department of Labour on progress in the implementation of its plan (Chapter III (13)(1)).<sup>22</sup>

The Act provides for the establishment of a Commission for Employment Equity to serve in an advisory capacity to the Minister of Labour, and as an educational, research and public relations body. The Act provides that the Commission will consist of groups representing organised labour, organised business, government, organised community

and development interests. The Act also provides that groups choosing representatives to the Commission should have 'due regard to promoting the representivity' of black, women and people with disabilities (Chapter IV (2a) (2) and (3)).

The monitoring and enforcement provided for in the Act utilises the existing industrial relations tools established under the *Labour Relations Act* 1995. Significantly, it adopts the dispute resolution model of the Act by utilising the services of the Commission for Conciliation, Mediation and Arbitration (Chapter V, B (46), but allocates exclusive jurisdiction to the Labour Court 'to determine any dispute about the interpretation or application' of the Act (Chapter V, B (49)). In the event of a finding of unfair discrimination, the Labour Court has the power to award compensatory or punitive damages, and to order employers to take steps to prevent future discrimination (Chapter V, B (50)).

The Act represents a careful balancing of voluntarism and coercion. Its introduction indicates the failure of the corporate sector to commit itself unequivocally to the principle of affirmative action and to introduce well structured and thoughtful programs in the workplace.<sup>23</sup> The Act also signifies the continued agitation on the part of the majority black population for some share in the economic benefits of the society now that the political battle has been overcome.

Although it is undisputed that affirmative action as principle and as policy are now accepted as part of the transformation project in South Africa, there are many challenges which it has spurned. The two most significant gaps bear directly on the political future of the country and the success of the principle of non-racialism. The first challenge touches on the issue of racial identity; the second on the battle around merit or standards.

### *Identity*

The question of racial identity is obviously central in the administration of affirmative action programs and policies. The architects of the transitional and final South African Constitutions provided the constitutional shield; they did not (and probably could not) spell out with specificity how 'disadvantage' was to be ascribed and prioritised. They approached this issue with a deep commitment to the principles of non-racialism coupled with some optimism. They could probably not have

predicted how apartheid's labyrinth of racial identification would create 'a competitive market in identity' (Ford, 1996: 1954) accompanied by some bitterness and rancour (Strydom, 1997: 911). Although all official documents describe members of disadvantaged communities as African, 'Coloured' and Indian, popular sentiment does not always reflect that understanding. As the country transforms itself politically and culturally and as it gradually leans towards its African realities (geographically and culturally) there has seeped into popular discourse a disturbing debate about racial identity and more specifically the question of 'Africanisation' (Singh, 1996: 2).

The question of racial identity in South Africa has always been treated in a facile manner. In the years preceding the end of apartheid, and particularly the ascension of the Black Consciousness ideology in the 1970s, the designation 'black' was reserved for all South Africans excluded from the vote, namely Africans, 'Coloured' and 'Indians'. The parcelling of the public (and private) edifice of the country into 'white' (European) and 'non-white' (non-European), and the exclusion of all 'non-whites' from access to resources or adequate facilities, made possible this temporary united racial front for the sole purpose of eliminating apartheid. The establishment of the three-tiered system of Parliament in the early 1980s was the catalyst that infused this united front with vigour and enthusiasm. Widespread protests and continuous political and social unrest finally led to the release of President Nelson Mandela, and the historic political events that followed.<sup>24</sup>

However, immediately preceding the elections, and subsequently, it has become clear that racial unity in South Africa was ephemeral, despite the constitutional commitment and the rhetoric of non-racialism and the rainbow nation. The final Constitution provides in its founding provisions that 'the Republic of South African is one sovereign democratic state founded on ... non-racialism and non-sexism' (Constitution, 1996: Chapter I, s 1(6)). The racial divisions rear their heads in several situations, but most profoundly around the question of affirmative action. As is to be expected, and since they are an excluded group, the majority of white South Africans oppose affirmative action (although white women are the designated beneficiaries). The most startling opposition has come from significant sections of the 'Coloured' and Indian populations, whose attitudes are premised on the fear that 'Africanisation' in South Africa excludes all non-Africans. They therefore

believe (incorrectly) that they will be excluded from the benefits of affirmative action. President Mandela has continuously sought to reassure 'Coloureds' and Indians that they too, like Africans, will be beneficiaries of affirmative action. He has encouraged 'Coloureds' and Indians, who believe that they have been denied access to particular affirmative action programs, to lodge complaints with the appropriate government department.

However, it appears increasingly that these reassurances have not calmed the misgivings of 'Coloureds' and Indians, and conversely that they have reinforced a view of Africanisation which borders on narrow African nationalism (Singh, 1996: 2). The 'Coloured' population (the majority population group in the Western Cape) and 'Indians' (a significant majority in Natal) experienced the gamut of deprivations and humiliations perpetrated by successive colonial governments and the apartheid state. The test for the successful outcome of affirmative action programs will be their ability to redress apartheid's wrongs for all disadvantaged groups, given that 'disadvantage' was embedded in a racial hierarchy shaped by apartheid laws and policies.<sup>25</sup> Whether the divisions and mistrust can be eroded is hard to predict; they do, however, pose significant constraints on the move towards the non-racial future now espoused.

### *Merit*

One of the most enduring criticisms of affirmative action is the notion that it abandons merit. Critics claim that unqualified people are given positions and promoted, and that this lowers overall standards. The United States appears to have grappled with this issue most intimately; there standardised tests are used more than in any other society and a host of entrance exams serve as gatekeepers for the various professions and trades. Lichtenberg and Luban (1997: 21) and others have interrogated the so-called objectivity of these tests, and have attempted to distinguish the issue of the ability of members of disadvantaged groups to meet professional standards, or to perform well on tests, from the fairness of the tests themselves. Carter (1991: 50) has cogently argued that affirmative action is not contrary to notions of meritocracy; but a sound and workable affirmative action requires constant vigilance to ensure that the requisite standards are always maintained.

In South Africa the concept of merit has not really been subjected to rigorous scrutiny. This is not to suggest that the meritocratic standards do not exist; rather their substance and purpose have not been subjected to a thoroughgoing critique. There are several obvious reasons, but two are the most persuasive. First, a cursory examination of South African educational testing requirements, as well as entrance examinations for licence to practise in the various professions, still suggests a strong colonial resonance. For example, one of the country's most dominant professions, law, has strong historical roots in the Roman Dutch and British legal traditions, both in form and substance. Professional standards therefore have to be adjusted to accommodate the realities of the post-colonial and post-apartheid South Africa, and to interrogate the correlation between professional standards and how they are to be assessed. Although the new constitutional order has laid the foundations for a human rights culture, remnants of the colonial legal culture persist, particularly in the common law.<sup>26</sup> One of the remnants was the exclusion of large numbers of Black people on questionable (read racial) grounds; the new human rights culture calls for a certain inclusiveness with respect to previously excluded groups.

Similarly, university and high school courses, and indeed the whole educational endeavour, have only recently been subjected to a fundamental reorientation. The whole process of educational transformation has proven to be a painful one, and has often left educators, particularly those in the tertiary education system, bereft of an acceptable vision. It is in the universities, and particularly the historically white universities, that the battle about democratic education is most viciously fought. These universities, historically modelled after their British counterparts, have struggled to cope with increasing numbers of black students. A significant number of these students are graduating with weak academic skills because of the legacy of an inferior earlier education, and there is a strong demand for the 'democratising' and 'Africanising' of their educational institutions (Singh, 1996: 1). In short, questions about examinations, or standards, and their relation to job or professional requirements have rarely been tested in South Africa.

The second failure to interrogate the idea of merit in South Africa needs mention rather than elaboration here. For decades, under the 'Job Reservation' clause of the *Industrial Conciliation Act* 1956, certain categories of jobs were set aside for whites, without the pretext that they



had special skills or talents, but merely because they possessed white skins. Sachs (1992) has suggested accordingly that the apartheid system was one of the most successful affirmative action programs of this century. In a system of labour aristocracy predicated on the possession of a white skin, it is hard to argue the existence of meritocratic standards.

This is not to suggest that the question of merit or standards is a baseless one, and that it only serves as a pretext for adversaries of affirmative action to discredit such programs. However, the question as to what constitutes merit is a complex one and at its most basic requires some direct correlation between what is required of a candidate and that candidate's formal qualifications. In other words, the standards imposed need to be job related. In South Africa, the affirmative action program which underpinned apartheid was an unabashed exercise in racial preference. The affirmative action policy in place in South Africa today requires that the new government put in place a preferential system which does not just mimic the old system, but really ensures that merit is not discarded. But the standards which constitute that merit need to be thoroughly interrogated and not be used to exclude members of previously disadvantaged communities on spurious grounds.

### Section Three: Equality and Affirmative Action

By the early 1990s the drafters of the South African Constitution were able to benefit from the thorough international interrogation that the principle of equality had been subjected to by a range of scholars and policy makers. They could particularly draw succour from progressive inroads made by feminists and other critical scholars (Kramer, 1995: 265; Lahey, 1987: 5; Habermas, 1994: 107). Striking a balance between *de jure* equality on the one hand, which could in certain circumstances lead to further (socio-economic) inequality, and the need to incorporate substantive equality on the other, was difficult. In short, they faced the dilemma of a liberal constitutional framework, predicated on individual rights, incorporating group or sectional interests which required legal redress without the individual claim of unequal treatment.<sup>27</sup> This quandary demanded that the state at times abandon its neutral stance as arbiter of citizens equally situated, and affirmatively promote group or sectional claims.

In addition, references to the ideals of non-racism and non-sexism are scattered throughout the South African Constitution. In the Founding Provisions the Constitution tabulates the values that underpin the democratic state, which include non-racialism and non-sexism. The most significant provisions relating to racial and gender equality are found in the Bill of Rights, and in particular the section on equality (Chapter 2, s 9) This section embodies the commitment to equality before the law and equal protection of the law, and provides that:

the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth (Chapter 2, s 9(3)).

The prohibition on direct and indirect discrimination implicitly acknowledges the invidiousness and tenacity of institutionalised discrimination (Thornton, 1990). This acknowledgment reflects the dominant jurisprudential trends in liberal democracies where the principle of equality has been valorised in constitutional and legislative packages. Since the Constitution has only been part of the legal landscape since 1994, there has not been a voluminous jurisprudence interpreting its equality provisions. However, two cases, one emanating in the Constitutional Court in 1996 and the other in the Pretoria High Court in 1997, deal directly with the question of equality.<sup>28</sup>

In 1996 the Constitutional Court had occasion to rule on a constitutional challenge by a prison inmate in response to an executive order made by President Mandela under South Africa's interim Constitution which granted special remission of sentences for certain categories of prisoners. The category which the prisoner challenged applied only to 'mothers ... with minor children' (*Minister for Correctional Services v Hugo*, CCT/11/1996). The other categories included disabled persons and all persons under the age of 18 years who had been in prison at the time of South Africa's first elections in May 1994.<sup>29</sup> The respondent had a 12-year-old child, and he claimed that the provision in the Presidential Act was in violation of the equality provisions of the interim Constitution because it unfairly discriminated against him on the basis of sex or gender. He argued that the Act, by releasing all mothers whose children were under the age of 12, discriminated against fathers of children of the same age. In fact, the discrimination was two-fold: only women who were parents (of children under 12) were released; childless women were not.

The President's legal team argued that the rationale for the special remission of mothers of minor children was based on the 'special role that mothers play in the care and nurturing of young children'.<sup>30</sup> The court accepted that even though the President was motivated by the generalisation that mothers are primarily responsible for the care of small children (which could not be universally true), this did not render the discrimination unfair. They distinguished between the situation where women as a group are deprived of benefits based on their child-rearing responsibilities, to the situation under consideration where such women were given a positive benefit.<sup>31</sup> The court then considered the claim of unfairness arising from the exclusion of men from the disadvantaged category. Of course, the backdrop to the question was the identification of members of disadvantaged categories under the affirmative action measures found in s 9 of the Constitution.

Although the court was of the opinion that belonging to a disadvantaged group did not render the discrimination fair per se, it saw the need:

to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved (*Minister for Correctional Services v Hugo*: 36).<sup>32</sup>

The court appears to provide an expansive interpretation of unfair discrimination, going beyond the notion of formal equality, to one of substantive equality in line with a growing body of feminist legal theory. Feminist scholars have advocated for an interpretation of equality theory that recognises the real experiences of women; they reject a theory that is abstract and formal and does not address structural inequality (Majury, 1987: 180). However the Constitutional Court has not had occasion to confront squarely the issue of affirmative action. A State Supreme Court has, however, and its decision gave pause to supporters of affirmative action.

In *Public Servants' Association of South Africa v Minister of Justice* (1997) the court addressed a challenge by some white male attorneys to an affirmative action program adopted by the Ministry of Justice. Up until 1994 the public service in South Africa, and particularly the senior ranks, was dominated by white males. Indeed, it is generally accepted that the election of the Nationalist Party in South Africa in 1948

spawned a highly successful affirmative action program for South African whites, particularly Afrikaners, which was sustained for over four decades. The newly elected government in South Africa was faced with the task of integrating, indeed penetrating, this racial monolith. This task was made all the more daunting by the political compromise fashioned during the constitutional negotiations which secured the tenured positions of white public servants (Sparks, 1995).

With respect to the new public service, the interim Constitution provided that it should 'promote an efficient public administration broadly representative of the South African community' (s 212(2)(b)). It also required, however, that the public service should be rationalised rapidly to assist in its efficacy (s 237). The lawsuit was launched after the Ministry of Justice earmarked certain posts for promotion to be filled by members of previously disadvantaged groups, namely blacks, women and disabled persons, contrary to the provisions of the Public Service Staff Code. In terms of the Code, promotional decisions were to take into account the qualifications, level of training, merit, efficiency and suitability of the candidates for promotion. Extraneous factors such as race, gender and disability were *prima facie* not to be taken into account. Meanwhile to expedite the entry into the public service of significant numbers of members of formerly disadvantaged groups, the *Public Service Act* was amended in 1994.<sup>33</sup> The white males who were excluded from applying for the promotions were all experienced attorneys who had been employed in senior positions in the Ministry of Justice for periods ranging from five to 25 years. They were joined in the lawsuit by their professional association.

The issues which the court had to address involved the interpretation and balancing of four sections of the interim Constitution. Section 212(2)(b) provided that the public service should 'promote an efficient public administration broadly representative of the South African community'. Section 212(4) provided that the 'suitability' of candidates should be taken into account when making appointments and promotions. Section 212(5) provided that the requirement of 'suitability' should 'not preclude measures' designed to achieve representivity of the broader South African community, including their race, gender or disability. These constitutional provisions pertaining to the public service were underpinned by a general provision (s 8(3)(a)) of the interim Constitution which provided that:

This [equality] section shall not preclude measures designed to achieve the adequate protection and advancement of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.<sup>34</sup>

The court held that the constitutional provision in s 8(3)(a), which provided for affirmative action as not being contrary to the notion of equality, did not *prima facie* shield it from judicial review. The court attached specific conditions to certain words in the provision, namely, 'designed', 'adequate' and 'equal'. The court took the view that the term 'designed' did not license 'mere intention' and 'haphazard or random action', but required thoughtful measures designed to achieve a explicit goal. In other words, there had to be 'a causal connection between the designed measures and the objectives (640H).

The court limited the requirement of 'adequate' to its ordinary dictionary meaning of 'suitable or sufficient'. The court stipulated that any affirmative action measures adopted was not permitted to go beyond that which is adequate; that the end envisaged as well as the means employed is reviewable (640J and 641A). With respect to the condition of 'equal' the court considered that the interests of the targeted persons or groups were not be considered in a vacuum, but also 'with regard to the rights of others and the interests of the community and the possible disadvantages that the targeted persons or groups may suffer' (641C).

With respect to s 212(2), (4) and (5), the court held that the requirement of 'efficiency' was to be accorded the same weight as 'representivity', and that 'promote' was not synonymous with 'achieve immediately (642C). In other words, integrating the public service, that is, achieving representivity, was not to occur in a vacuum, but ought to be conducted alongside other constitutional requirements, such as efficiency. Although the 'suitability' of candidates included their race, gender or disability, other criteria such as qualifications and merit could not be sacrificed to the imperative of 'representivity'.

The court applied these principles to the facts in question, and concluded that the affirmative action measures adopted by the Ministry of Justice could not pass constitutional muster. The court found them 'haphazard, random and over-hasty', that they failed to meet the requirements of 'designed' and 'adequate' as mandated by the Constitution, and that they unfairly discriminated against the excluded white male candidates (642-6). The Minister of Justice did not appeal the

court's decision, but instead went back to the drawing board to comply with the requirements outlined in the court's ruling. Although at first glance the ruling appears alarming to supporters of affirmative action, a close reading suggests that the court was not questioning the constitutionality of affirmative action, but was merely attempting to place suitable Constitutional parameters within which the programs could operate.

#### Section Four: The Possibilities and Limitations of Affirmative Action

Since affirmative action policies and programs have only been in existence in South Africa for a few years, the conclusions about their success or otherwise that can be drawn at this stage are rather tentative. Moreover, such an assessment is linked to an overall evaluation of the political transformation in South Africa, since affirmative action is a key component of transformation. Part of the difficulty lies in drawing the boundaries between those programs which are appropriately labelled 'affirmative action', and those that can be categorised as social welfare programs. In other words, even though one can distinguish between those measures constitutionally protected to ensure 'representivity' in the public and private institutions of the society, and those basic needs that the state pledges to meet as part of the parcel of rights encapsulated in the Constitution, an assessment of the success of affirmative action involves both. In short, evaluating the effectiveness of affirmative programs cannot occur outside an overall assessment of political and economic transformation because of the official decision to hitch affirmative action to the overall transformational project.

If affirmative action is to be deemed successful<sup>35</sup> it has to achieve more than cosmetic results. The record in other societies where affirmative action programs are in place suggests that certain steps may preclude this. With respect to prospective beneficiaries, one of the constant criticisms of affirmative action in South Africa is that only the black elite or those who need assistance least will benefit. This criticism is only partly true. It is undisputed that the most qualified male black candidates and women are the ones most likely in the short term to benefit from affirmative action. But that is the purpose of affirmative action: first, to provide immediate access to employment (and to scarce places in higher education too, to the historically excluded) and, second,

to adopt appropriate mechanisms to ensure that the pool of likely candidates from the previously excluded community grows. The current reality in South Africa is that the legacy of apartheid, discussed in Section One, has left the pool of black candidates likely to immediately benefit from affirmative action quite small. Moreover, this legacy of economic inequality has, at least for the foreseeable future, rendered race and class interchangeable. However, if affirmative action programs are to remain popular, particularly among the majority of black South Africans, and if they are in the long run going to achieve what they were designed to, their application cannot be confined to reinforcing a (small) black middle class (Daley, 1997: 1).

The success of affirmative action is predicated on careful planning, supportive structures and good faith efforts. Where affirmative action follows a legislative directive, good policy would suggest that its interpretation and regulation should be flexible and should accommodate to the peculiarity of each institution and the specific circumstances of each affirmative action program. The architects of the new constitutional and political order could not have considered that affirmative action would be an unthinking replacement of whites with blacks. What was surely envisaged was a transformation that would harness the skills of all South Africans and not just a minority of the population.

In the employment sphere, it is clear that a workable affirmative action program demands a rethink of the corporate culture, values and language, and an accommodation and sensitivity in the workplace to cultural and/or language differences. An effective affirmative action strategy requires a reconsideration of the communications network within corporate organisation. Specifically such a strategy will address informal networks which had hitherto excluded blacks and women from access to important employment related information (Sachs, 1993; Thornton, 1997: 310).

The constitutionality of affirmative action programs in South Africa is not much cause for concern. This bargain was struck early on and, despite the Pretoria Supreme Court's decision, the constitutional mandate has not been affected. The concern, however, is one of policy, and raises the central question about whether affirmative action is good policy in light of the government's commitment to the philosophy of non-racialism. This concern is not just confined to South Africa. As we end the millennium, global developments indicate that affirmative action

predicated on racial or ethnic identity is a gamble. In Africa particularly, the task of nation-building has required a 'downplaying' of identity politics.<sup>36</sup> South Africa's history of racial classification makes this a particularly precarious enterprise. However, it would be impossible for South Africa to achieve democracy without affirmative action. As mentioned earlier in this chapter, the gross inequities left by successive colonial governments and the apartheid state requires a massive redistribution through a series of governmental interventions. The South African government cannot afford to let developments in the market provide the incremental pace; it has to intervene to make non-racialism possible.

But affirmative action in South Africa needs to face head on some important challenges. Their political popularity and constitutional acceptance will not protect the programs and policies from the same kinds of shortcomings and abuses experienced in other societies where such forms of social engineering have been tested. There are some fundamental issues which have to be confronted. Affirmative action is not social welfare legislation. The provision of education, housing, electricity, sanitation and other basic needs of people is ultimately the task of the government and essentially depends on resource availability. With respect to affirmative action, however, and because of the huge disparities in income based on the historical patterns of discrimination, many black people today are unable or unlikely in the short term to benefit from affirmative action programs. But the provision of basic needs by the state, and in particular education, may make it possible and may speed up the process of likely benefits for more people through affirmative action.

Affirmative action is not the panacea for the continuing inequalities in South Africa, and it will not address all the discrepancies and deprivation. But it goes some way to addressing the problems and creating the conditions for equity and diversity. Its success will depend on constant vigilance to ensure that it achieves its objectives. President Mandela's statement locates the significance of affirmative action in South Africa:

Until a few years ago the term affirmative action was virtually unknown in our country. Now it is one of the most widely debated concepts in the land. For millions it is a beacon of positive expectation, a promise of better things to come. For others it is an alarming spectre which they see as a threat to their personal security and a menace to the integrity of public life (Mandela, note 10).



Today there are threats to personal security and the integrity of public life. But the culprit is not affirmative action; it may just be continued economic inequality.

## Notes

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1. The collapse of the Eastern European governments dealt both a substantive and ideological blow to those who had advocated a program of economic redistribution in South Africa: see Adam and Moodley, 1993; also Sparks, 1995.
  2. This concept is sometimes referred to as preferential treatment, benign discrimination, or reverse discrimination. The concept of 'affirmative action' incorporates a myriad of programs and can mean many different things. They can include:
    - outreach programs to broaden the pool of eligible individuals to include more members of 'disadvantaged minorities' or women;
    - targeted or compensatory training to upgrade the qualifications of individuals of minority populations or women;
    - goals and timetables to measure progress;
    - preferences;
    - set-asides (for example, in government contracts and licences);
    - actual quotas (see Galston, 1997).
  3. The debate within the United States is an interesting point of reference, both because of its intensity, and because affirmative action concepts (as legal mechanisms) first found fertile ground there. Americans have generally been divided in their support for affirmative action. The statistics suggest that affirmative action has always been more popular amongst African-Americans than amongst their white counterparts: see Terkel, 1992, and Marable, 1996; see also Zelnick, 1996. Although both racial minorities and women benefit from affirmative action programs, my reference is largely to the impact of affirmative action on racial minorities, and more specifically African-Americans. This is so because race relations remain 'America's constant curse' (President Clinton in his inauguration address, January 1997). Even though the statistics suggest that middle class white women have been the overwhelming beneficiaries of affirmative action programs, much of the popular debate focuses on the benefits to African-Americans: see Banks in this volume.
  4. Reference to the negotiations in this article refers to CODESA 1 (the first multi-party Convention for a Democratic South Africa) which commenced in December 1991; the second Convention CODESA II, which commenced in May 1992; and the third session, normally referred to as the Multi-Party Negotiating Forum or the World Trade Centre talks which commenced in April 1993 after a lengthy breakdown over violence and key constitutional issues. For an insightful account of the negotiations, see Sparks, 1995; see also Friedman and Atkinson, 1994.

5. Arguably the Malaysian affirmative action experiment was more ambitious. The program there involved set-asides and allocations in not only education and employment, but political participation at the local and national level: see Putschacheary, 1991: 61; and Havanur, 1992.
6. See the *Reconstruction and Development Program*, African National Congress (1994). The Reconstruction and Development Program was introduced by the ANC as a five year plan of governance. Since 1994, it has been modified to accommodate the economic challenges facing the government. With respect to affirmative action, it has been noted that:  
the ANC conception of affirmative action is more expansive, yet more fundamental than the American conception because it not only includes measures to redress past discrimination, but also requires public and private actors to build an equal society through redistribution and corrective policies (Robinson, 1993: 513).
7. See generally *Reconstruction and Development Program* ANC (1994). In this respect the South African approach may mirror that in India with respect to the 'Scheduled Castes'; see Mendelsohn in this volume.
8. A few years after the RDP was published, the Growth, Employment and Redistribution Program (GEAR) was launched, ostensibly a more realistic plan to accommodate South Africa's national needs and place in the global economy: see Bassett, 1988: 26.
9. Affirmative action policies are intended to benefit women as well as black South Africans: see Andrews, 1996. However, because of the legacy of racism, the present chapter will largely focus on race-conscious affirmative action without specific reference to gender even though it is recognised that black women, and particularly African women, were the most disadvantaged members of the South African polity: see Wing, 1995: 8. I use the term 'black' to include all people labelled as 'non-white' under apartheid South Africa's racial classification laws, which include people classified as 'coloured' as well as Indian South Africans.
10. The Hon Nelson Mandela, Statement on Affirmative Action in *Affirmative Action in South Africa: Conference Proceedings* (1991).
11. The racial hierarchy mandated by apartheid provided for differentials amongst 'non-white peoples' – groups classified as Indian, Coloured, and African: see *Apartheid: The Facts* (1983).
12. The comparison with the United States is most appropriate because of the shared history of racial segregation of the two societies and because the racial debates often appear to overlap. However, there are huge demographic, historical, and cultural differences between the two societies which are also worth noting. For a discussion of the comparisons between these two societies, see Ford, 1996.
13. The notion of preferential treatment was first articulated by President Lyndon B Johnson in an oft-quoted address to Howard University in 1965: 'You do not take a person who for years has been hobbled by chains and liberate him, bring him to the starting line of a race and then say, "You are free to compete with all the others" and still justly believe you have been completely fair' (quoted in Rossein, 1990: 20-11, n 31). Similar sentiments were echoed by Blackmun J in *Regents of California v Bakke* (1987).
14. Opened for signature 16 December 1966, 660 UNTS 195 (adopted by the UN General Assembly in New York on 21 December 1965, entered into force on 4 January 1969).

15. GA Res 180, UN GAOR, 34th Sess, Agenda Item 75, UN doc. A/RES/34/180 91980.
16. This section deals with the issue in a perfunctory manner only. It is elaborated in the other chapters of this volume, especially that of Chibundu.
17. See, for example, *Griggs v Duke Power Co* (1971); *United Jewish Organisations, Inc v Carey* (1977); *United Steelworkers v Weber* (1979).
18. The benefits of affirmative action have been described as follows:
  - that it provides occupational and educational advancement for members of disadvantaged communities and women;
  - that it allows for beneficiaries the accumulation of valuable experience;
  - that it provides for the expansion of the professional and entrepreneurial class who are able to pass on the benefits to the next generation;
  - that it makes available role models from disadvantaged communities and women;
  - that it results in the eradication of debilitating and negative stereotypes of groups;
  - that society benefits from the involvement of women and members of disadvantaged communities in the provision of essential services (for example, service in the police and emergency services);
  - that it encourages integration which represents the society's commitment to the ideals of racial equality and opportunity.For a comprehensive discussion of these issues, see Sachs, 1992; Brooks, 1990; Harris, 1993; Kennedy, 1990; Adams 1993.
19. Reddy, 1997. These issues are explored in depth by Mendelsohn in this volume.
20. I state these 'formal' requirements uncritically, although it is worth bearing in mind that their articulation and operation occurred in a system of job reservation for whites, particularly Afrikaners. Obviously nepotism and cronyism was rife in that system, but we can assume at best that these requirements were on occasion demanded, and at worst that they were given some lip service for appointment and promotion purposes.
21. There are whites who hold ministries and senior government posts, but they are a minority.
22. This section of the Act resembles aspects of the Australian *Affirmative Action (Equal Employment Opportunity for Women) Act* 1986 (Cth).
23. It is worth noting, however, that some companies have introduced affirmative action programs and with some success. But overall the record is quite disillusioning. See Marcia Kelin 'More Not Better with Affirmative Action in South Africa' *Business Times* 7 September 1997, 55. See also Don Robertson 'Affirmative Action Loses its Ranking Management Priorities *Business Times* 7 September 1997, 49. But even in the public sector the government continues to face significant obstacles to affirmative action. See David Greybe 'Failure on Affirmative Action Will be Punished' *Business Day* 10 February 1998, 53.
24. The South African government, faced by an increasingly weak economy, political and economic isolation, and widespread internal protests, introduced a three-tiered system of Parliament in 1983, in which Whites, 'Coloured' and 'Indians' had a vote, but which excluded the majority African population. This development triggered massive political campaigns by trade unions and community organisations, and increased the intensity of anti-apartheid activity particularly in Western Europe, the United States and

- Australia. Sanctions legislation was introduced in many of these societies, and finally in 1990, the ruling Nationalist Party agreed to release President Nelson Mandela and all political prisoners, unban all political organisations so banned, and set in motion the process of negotiations which led to the drawing up of the interim constitution and the first democratically elected government. See Friedman and Atkinson, 1994.
25. The *Population Registration Act* 1950, repealed in 1991, classified South Africans into various racial groups broadly white, 'coloured', 'Indian' and African with different subgroups in each of the 'non-white' categories. The Act also provided for individuals to be classified as 'honorary whites' or to be re-classified within the various racial groups (Bindman, 1988: 4).
  26. Whether the Roman Dutch or British common law protected human rights in the old apartheid order has been subject to much scrutiny by legal scholars. See, for example, Dugard, 1978. Without delving into the debate, it is a fairly uncontested notion that the new constitutional order, and particularly the Bill of Rights, has the potential to provide much greater human rights protection than was previously the situation in South Africa.
  27. The South African Constitution reflects the compromises reached to deal with the conflicting visions of the new democratic order. These visions included, but were not limited, to competing claims of redistribution of land (for African communities rendered landless under apartheid) versus protection of individual property rights; the protection of traditional law and institutions versus the claims of gender equality; the right to freedom of speech versus the outlawing of racial slurs and hate speech: see Sparks, 1995.
  28. The Constitutional Court is the highest court in the country. The case in the Pretoria Supreme Court was not appealed to the Constitutional Court, so it still stands as precedent on this issue.
  29. Presidential Act No 17 1994.
  30. The President's affidavit stated that he:  
     'was motivated predominantly by a concern for children who had been deprived of the nurturing and care which their mothers would ordinarily have provided. ... I am ... aware that imprisonment inevitably has harsh consequences for the family of the prisoner. ... Account was taken of the special role ... that mothers play in the care and nurturing of young children (CCT 11/96: 30).
  31. The court referred to *Incorporated Law Society v Wookey* (1912), the judgment which deprived women of the right to practise law.
  32. Justice O'Regan's concurring opinion makes the point even stronger:  
     To determine whether the discrimination is unfair it is necessary to recognise that although the long-term goal of our constitutional order is equal treatment, insisting upon equal treatment in circumstances of established inequality may well result in the entrenchment of that inequality ... There is no doubt that the goal of equality entrenched in our Constitution would be better served if the responsibilities of child rearing were more fairly shared between fathers and mothers. The simple fact of the matter is that at present they are not ... We cannot ignore this crucial fact in considering the impact of the discrimination in this case (*President of South Africa v Hugo* (1996: 87-8)).

33. Proclamation 103 of 1994. The Proclamation was promulgated in pursuance of the constitutional directive (s 212(5)) to integrate the public service as speedily as possible.
34. This section was altered somewhat in the final Constitution, specifying that the measures be taken as positive and not defensive.
35. Perhaps it can be judged 'successful' if there is a positive answer to the question whether black people, women and disabled people are more represented in the workplace and are economically in a better position than they were during the apartheid years.
36. I recognise that this characterisation is a gross simplification of the complicated process of nation-building in many countries in Africa. In fact, racial or ethnic identity has been used in the most opportunistic ways to maintain dominance in fragile democracies. My point really is that in order for national reconstruction to proceed in situations of multi-ethnic communities, the national identity becomes pre-eminent vis-à-vis ethnic identity: see Chanock, 1998.

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